FOR ARGUMENT

Supreme Court, U.S.
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In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, et al.,

Petitioners,

v.

VERNA KELLY, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE THE MISSOURI BAR IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE[1]

The Missouri Bar is a unified bar association consisting of all attorneys licensed to practice in the State of Missouri. Mo.R.Civ.P. 7.01. Currently, nearly twenty-five thousand (25,000) attorneys comprise The Missouri Bar.

Missouri attorneys have a strong interest in the validity of the Minnesota Announce Clause in Minn. Code of Jud. Con. Canon 5(A)(3)(d)(i).[2] The analogous Missouri rule, Mo.R.Civ.P. 2, Canon 5(B)(1)(c), contains a similar provision. This Missouri Rule applies to all candidates for state judicial office in Missouri, including both appointed and elected positions. Since the middle of the last century, all Missouri Supreme Court and Courts of Appeal Judges, and all trial level Circuit and Associate Circuit Judges in urban areas have been selected under the Missouri Nonpartisan Court Plan, a merit system known nationally as "The Missouri Plan." Mo. Const. Art. 5 Sec. 25(a-g).[3] Nonpartisan merit selection panels screen candidates for state appellate judgeships in Missouri and candidates for

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[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that no party had any role in writing this brief. No one other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief. This brief is being filed with the consent of the parties, as documented in a letter filed by Respondents' counsel and signed by counsel for all parties.

[2] The Announce Clause provides "A candidate for judicial office . . . shall not . . . announce his or her views on disputed legal or political issues."

[3] For background information relating to The Missouri Plan, please see Hall, H., *Missouri Nonpartisan Court Plan*, 33 Kansas City L. Rev. 163 (1965).

trial level judgeships in Missouri's urban areas. *Id.* These panels submit three (3) nominees for each vacancy to the Governor of Missouri. *Id.* The person appointed must then stand for retention during the next general election. *Id.* at Sec. 25(c)(1). In Missouri's rural areas and smaller towns and cities, trial level judges run for election in partisan contests, first in primary elections, and then in general elections. R.S.Mo. Sec. 478.010.1 (1994) and Mo. Const. Art. 5 Sec. 27.

Missouri therefore has two (2) different procedures for selecting state judges. Of note, all candidates for judgeships in Missouri must abide by the Missouri Announce Clause. This Rule applies to candidates for judicial positions in partisan primaries and general elections in rural areas and those seeking nomination by a merit selection committee, appointment by the Governor, or retention by the voters under the Nonpartisan Court Plan.

The procedures for selecting judges in Missouri, including the reasonable and constitutional limitations in its Announce Clause, have resulted in the selection of fair, competent and independent judges, both on the trial and appellate levels, and in rural, suburban and urban areas, without violating the Free Speech Clause of the First and Fourteenth Amendments to the United States Constitution. For these reasons, Amicus Curiae The Missouri Bar urges affirmance of the decision of the Court of Appeals upholding the constitutionality of the Minnesota Announce Clause. Missouri's experience with a similar provision, which applies throughout a diverse state and

to candidates for both elected and appointed judgeships, may be informative to this Court.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

The United States District Court for the District of Minnesota and the United States Court of Appeals for the Eighth Circuit construed the Minnesota Announce Clause narrowly and then correctly upheld its constitutionality. The decisions below rest on well-established principles of federal constitutional law applied without strained logic or legal gamesmanship. Because Petitioners have demonstrated no error below, this Court should affirm the decision of the Court of Appeals.

All parties agree on the appropriate analysis in this case. The Minnesota Announce Clause is a content-based restraint on speech. To survive constitutional challenge, Respondents must demonstrate that the Announce Clause is narrowly drawn to achieve a compelling state interest. With the exception of one (1) amicus brief, Petitioners and Amici concede that the Court of Appeals correctly found that Minnesota has compelling interests "in an independent and impartial judiciary" and "in preserving the public's confidence in that independence." Accordingly, this Court must decide only whether the Minnesota Announce Clause is narrowly drawn to accomplish these admittedly compelling interests.

The Minnesota Announce Clause, as construed by the District Court, the Court of Appeals, and now the Minnesota Supreme Court, is drawn with great precision to

accomplish exactly and only Minnesota's compelling interests. The Announce Clause prohibits only those announcements on disputed political or legal issues likely to come before the candidate if elected. This provision directly addresses a specific problem, without spilling over into other areas. The specific interest addressed is the harm caused when judicial candidates make comments about matters on which they must later rule as judges. Few situations are more injurious to public confidence in the judicial system than a judge hearing a contested matter after making categorical public statements about the key issues in that matter. It makes sense, therefore, to draw the boundary of impermissible announcements by judicial candidates around those subjects likely to come before the court. Comments of this type are likely to damage the litigants' and the public's views of the impartiality and fairness of the proceeding. Comments on other topics are not. Further, contrary to the contention of Petitioners, the subjects *likely* to come before a state court are reasonably predictable. Judicial candidates and the persons charged with enforcing the Announce Clause should be able to predict with some precision whether a specific topic is *likely* to be the subject of a litigated case in that particular court.

The Minnesota Announce Clause works in practice and addresses only the types of announcements which might defeat Minnesota's compelling state interests. This Court should affirm the decision of the Court of Appeals and uphold the constitutionality of the Minnesota Announce Clause.

ARGUMENT

The parties agree on the appropriate constitutional analysis. "[A]n absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *U.S. v. Grace*, 461 U.S. 171, 177 (1983); *U.S. v. Playboy Entertainment Group*, 529 U.S. 803, 813 (2000). Respondents established both elements below, to wit: 1) the compelling nature of Minnesota's interests; and 2) the appropriate narrowness of the restriction and its effectiveness in accomplishing those interests.

A. Petitioners Concede that Minnesota Has Compelling State Interests.

Petitioners have confessed the first element in the analysis of the constitutionality of Minnesota's Announce Clause. They acknowledge that the Court of Appeals correctly identified two (2) separate compelling state interests, judicial independence and judicial impartiality. Petitioners Brief at pp. 5-13.[4] Amici American Civil

[4] Petitioners argue, however, with hyper-technical wordplay, that only judicial impartiality is at issue here. They cite as authority for this proposition a speech by the Lord Chancellor, Lord Irving of Lairg, and the *Remarks of Hon. Shirley S. Abrahamson* in The St. John's Journal of Legal Comment. *See* Petitioners' Brief at pp. 6-7. Amicus Curiae asserts that the concepts of judicial "independence" and "impartiality" are inter-related concepts and any attempt to separate them for purposes of analyzing the constitutionality of the Announce Clause is artificial. As noted, *infra*, the problem which Minnesota intended to address through the Announce Clause is the harm caused when judicial candidates comment publicly on

Liberties Union and The Minnesota Civil Liberties Union make a similar concession:

> Properly understood, the governmental interest at stake in this case is the compelling interest in avoiding compromise of the judicial function of deciding each case on the basis of a fair and impartial hearing, after giving due consideration to the arguments and evidence presented by the parties. *Amici agree that this function is central to the rule of law.*

ACLU Brief at p. 3 (emphasis added); *see also* Public Citizen Brief at p. 2 ("Public Citizen agrees with the lower Courts' finding that these interests are compelling.").

As Petitioners concede the first analytical element in favor of Respondents, this Court must decide only whether the Minnesota Announce Clause is narrowly drawn to accomplish Minnesota's admittedly compelling state interests.

B. The U.S. District Court and Court of Appeals Properly Gave the Minnesota Announce Clause a Narrow Construction.

Both the District Court and the Court of Appeals correctly construed the Minnesota Announce Clause to apply only to comments on disputed political and legal issues which are "likely to come before the candidate if

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issues and are then asked to hear cases involving those issues. It does not matter whether this problem is framed in terms of "independence" or "impartiality." Even the Lord Chancellor admits the connection between the two (2) interests and their at most "slight difference." *See* Petitioners' Brief at p. 7.

elected into office." *Republican Party v. Kelly*, 247 F.3d 854, 881 (8th Cir. 2001); and *Republican Party v. Kelly*, 63 F. Supp. 2d 967, 974-83 (D.Minn. 1998). The Minnesota Supreme Court has since adopted this construction of the Minnesota Announce Clause. *In re the Code of Judicial Conduct*, ___ N. W. 2d ___, 2002 WL 126537 (Minn. January 29, 2002). Petitioners suggest that this narrow construction of the Rule is somehow improper and therefore taints the analysis below. Yet, in taking this approach, the lower courts followed principles of statutory construction well-established in the decisions of this Court, to-wit: "where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 2279 (2001), (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988), this Court reiterated that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* at 575 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

The narrowing construction of the Minnesota Announce Clause by the lower Federal Courts, which has now been adopted by the Minnesota Supreme Court, is analogous to the approach taken and approved by this Court in *Edward J. DeBartolo, supra*, and in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-05 (1985). This well-established and sanctioned approach to statutory construction does not constitute the type of "disingenuous evasion" which this Court disallowed in *Salinas v. U.S.*, 522 U.S. 52, 60 (1997) and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 57 n.9 (1996). There is nothing

"disingenuous" about the narrow construction given to the Minnesota Announce Clause by the District Court, the Court of Appeals and the Minnesota Supreme Court. It is not only "fairly possible," but reasonable and obvious to limit the Announce Clause to those announcements on disputed legal issues "likely to come before the candidate if elected into office." Statements by judicial candidates are worrisome when they relate to matters likely to come before those persons once they become judges. They are far less problematic when they relate to other matters.

The Court of Appeals based its acceptance of the District Court's narrow construction of the Announce Clause on its analysis of the approach the Minnesota Supreme Court would likely take in construing the Rule. *Republican Party v. Kelly*, 247 F.3d at 881. In fact, the Minnesota Supreme Court has now adopted precisely this construction of the Announce Clause. *In re Code of Judicial Conduct, supra*. Even absent the adoption of the narrow construction by the Minnesota Supreme Court, this Court should give great deference to the lower courts' construction of the Announce Clause. *Brockett v. Spokane Arcades*, 472 U.S. at 499 ("Normally, however we defer to the construction of a state statute given it by lower federal courts."); *see also Charden v. Fumero Soto*, 462 U.S. 650, 654-55 n.5 (1983). This Court defers to lower federal courts on state-law issues unless there is "plain error" or the constructions are "clearly erroneous." *Brockett v. Spokane Arcades*, 472 U.S. at 500 n.9. This is a sensible approach to the respective roles of the lower Courts and this Court. As noted in *Brockett*, "[w]e do so (give deference to lower federal courts on issues of state statutory

construction) not only to 'render unnecessary review of their decisions in this respect,' but also to reflect our belief that the District Courts and Courts of Appeals are better schooled in and more able to interpret the laws of the respective States." *Id.* at 500 (parenthetical added for context, cites omitted). Now that the Minnesota Supreme Court has spoken on this issue, Petitioners cannot reasonably argue that this Court should analyze the Minnesota Announce Clause as written, as opposed to the manner in which it has been construed.

Finally, as noted by the Court of Appeals, Petitioners failed to challenge the District Court's narrow construction of the Minnesota Announce Clause in their opening briefs in the Court of Appeals and therefore waived any complaints about that aspect of the District Court's decision. *Republican Party v. Kelly*, 247 F.3d at 881.

C. The Announce Clause as Construed Is Narrowly Drawn and Accomplishes the Purpose of Furthering Minnesota's Compelling Interests.

The Minnesota Announce Clause as construed by the lower Federal Courts and the Minnesota Supreme Court is precisely drawn to achieve Minnesota's compelling interests "in an independent and impartial judiciary" and "in preserving the public's confidence in that independence." Statements by judicial candidates about matters which are likely to come before the court undermine that confidence. The Minnesota Announce Clause as construed addresses those problems exactly without burdening other categories of speech.

Petitioners have seized on Judge Posner's concern as set forth in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993), that the type of limiting construction employed by the lower Federal Courts here (and now adopted by the Minnesota Supreme Court) will effectively preclude virtually all comments by judicial candidates. He argues that just about every possible political and legal issue might conceivably surface in a litigated case. *Id.* at 229. This argument both misses the point and overstates the case.

Initially, it does not matter whether the number of prescribed topics is few or many. If a subject is likely to come before a Minnesota judge if elected, that person as a candidate should not comment. This restriction is neither arbitrary nor unfair. It is inextricably connected to the duties and obligations of judges and therefore applies to persons who want to be judges. While judicial candidates have First Amendment rights, the nature of the positions they seek necessarily requires certain reasonable limitations on those rights.

The limitations in the Announce Clause are really no different than the reasonable content-based restrictions which apply in other contexts due to the nature of the employment or position sought. Persons who aspire to certain professions and positions understand that there may be limitations on their abilities to express their views. Professionals understand and accept limitations on their abilities to discuss privileged information. Government employees and independent government contractors accept limits on their rights to express their

opinions. *Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 676 (1996) ("We have, therefore, 'consistently given greater deference to government predictions of harm used to justify restriction of (governmental) employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.' "(parenthetical added)); *United Public Workers of America v. Mitchell*, 330 U.S. 75, 98-103 (1946); and *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). Military personnel face similar restrictions on their abilities to exercise the types of First Amendment Free Speech rights available to persons employed elsewhere. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."); *Brown v. Glines*, 444 U.S. 348, 354 (1980); and *Parker v. Levy*, 417 U.S. 733, 744-58 (1974).

This Court has consistently held that the First Amendment rights of the other key participants in the legal system, attorneys, may be limited in order to ensure the system's proper functioning. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1070-72 (1991); *Sacher v. U.S.*, 343 U.S. 1, 8 (1952). Even parties' First Amendment rights may be limited in the context of a litigated case. In *Seattle Times Company v. Rhinehart*, 467 U.S. 20 (1984), this Court unanimously held that a newspaper which had been sued in a defamation suit could be enjoined from publishing certain matters. *Id.* at 32-33. This Court noted: "[A]lthough litigants do not surrender their First Amendment rights at the courthouse door, those rights may be

subordinated to other interests that arise in this setting." *Id.* at 33 n.18.

Similarly, the First Amendment rights of judges are not absolute. Minnesota judicial candidates must understand that as part of the process of seeking judicial office they cannot make statements as candidates which might later reasonably call into question their independence and impartiality as judges. If Minnesotans want to serve as judges, they must accept the reasonable limitations on those campaign activities which the State of Minnesota has determined might affect their abilities to later carry out the State's admittedly compelling interests.

Apart from their relevancy, the concerns about the alleged all-encompassing nature of the prohibition in the Minnesota Announce Clause as construed are exaggerated. As a matter of fact, the types of cases and issues which state court judges are *likely* to consider are relatively proscribed. The extreme example cited by Judge Posner, the possibility that the validity of the war in Yugoslavia might arise in the context of a family law case, is certainly not *likely*. Persons knowledgeable about the state courts should be able to discern without particular difficulty whether an issue is likely to arise in subsequent litigation.

Petitioners and Amici downplay the clear, cogent and exact connection between the reasonable restrictions of the Minnesota Announce Clause as construed and the admittedly compelling State interests they serve. They assert instead that there are less restrictive methods available to Minnesota to achieve these same goals. Where they err, however, is in citing to possible reforms and

rules which further the goals of improving confidence in the judicial system by alleviating problems other than the problems caused when judicial candidates comment on issues and are later asked to hear cases involving those issues. For example, in its scholarly and well-written brief, Public Citizen advocates campaign finance reform, noting that large campaign contributions by lawyers to judges are a more serious problem than the problem which Minnesota sought to alleviate through its Announce Clause. That may be, but the existence of potential remedies for the problems caused by large campaign contributions as well as other problems identified by Petitioners and Amici is not the issue. This Court must determine not whether there are more narrow alternatives which further the broad goals of increasing public confidence in the judicial system. Instead, the issue is whether there is a more narrow way to solve the specific problems caused by comments made by judicial candidates on issues which they must later decide as judges.

In effect, Petitioners improperly seek to attack Minnesota's approach to a specific problem by saying that the broad goals of improving public confidence can be accomplished by attacking other problems in other ways. All of the allegedly less restrictive alternatives to the Minnesota Announce Clause suggested by Petitioners and Amici fail for this reason. They address various aspects of the judicial system which may need improvement, but which do not relate directly to the precise problem which Minnesota sought to alleviate in adopting the Announce Clause.

CONCLUSION

The Court of Appeals correctly construed the Minnesota Announce Clause narrowly and found it constitutional and not violative of the Free Speech Clause of the First and Fourteenth Amendments to the U.S. Constitution. This Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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